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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

DARYLL RICHARDSON AND JOHN WALKER,
Petitioners,

v.

RONNIE LEE MCKNIGHT,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF RESPONDENT RONNIE LEE McKNIGHT

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QUESTION PRESENTED

Are prison guards employed by a private, for-profit corrections corporation that carries out functions traditionally performed by a state department of corrections entitled to assert qualified immunity in an action for damages brought under 42 U.S.C. § 1983?

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BRIEF OF RESPONDENT RONNIE LEE McKNIGHT

STATEMENT OF THE CASE

A. Factual Background

Respondent Ronnie Lee McKnight is a prisoner at the South-Central Correctional Center (SCCC) in Tennessee. He filed an action for damages under 42 U.S.C. § 1983 against petitioners Daryll Richardson and John Walker, two prison guards employed by the Corrections Corporation of America (CCA), and SCCC's Warden, John Rees. CCA is a private, for-profit corporation that operates SCCC under contract with the Tennessee State Department of Corrections pursuant to Tennessee's Private Prison Contracting Act of 1986, Tenn. Code Ann. § 41-24-101 *et seq.*

McKnight's complaint asserts that petitioners infringed his Eighth Amendment right to be free from cruel and unusual punishment by transporting him to the SCCC in handcuffs and ankle shackles that were far too tight for his large frame. His discomfort was so evident that other inmates on the bus implored petitioners to loosen the

restraints. Pet. App. 44, 45. Not only did petitioners refuse to loosen McKnight's shackles, but they showered him with abusive language, telling him that he "was getting what he deserved" and that he should "suffer." *Id.* at 46, 47. McKnight, who weighs 302 pounds and is in poor health, alleges that the cuffs and shackles cut off his circulation and caused extreme pain and swelling. *Id.* at 45-46. By the time McKnight arrived at the SCCC, he could not walk without assistance. *Id.* at 47. His injury from the cuffs and shackles was so severe that he required hospitalization, and he continues to receive treatment to improve circulation to his limbs. *Id.*

B. Decisions Below

McKnight filed this action *pro se* on March 3, 1994, in the United States District Court for the Middle District of Tennessee. Because McKnight sought leave to proceed *in forma pauperis*, the district judge referred McKnight's complaint to a Magistrate Judge to evaluate whether "the action [was] frivolous or malicious." 28 U.S.C. § 1915(d). The Magistrate Judge concluded that the "plaintiff states an arguable claim that his Eighth Amendment rights were violated by the SCCC transport officers. The Eighth Amendment prohibits the unnecessary and wanton infliction of pain upon a prison inmate." Docket Entry 4, at 3. The Magistrate Judge recommended dismissal of McKnight's claim against the Warden, however, because he was not alleged to "have had any actual involvement in the transport incident," and dismissal of McKnight's claim based on the demeaning and degrading remarks made by the guards, because neither verbal abuse nor slander is actionable under § 1983. *Id.* at 4. After further briefing, the district court adopted the Magistrate Judge's report and recommendation, allowing McKnight's Eighth Amendment claims against petitioners to proceed. Docket Entry 5.

Petitioners then moved to dismiss on the basis of qualified immunity. Their motion was referred to the

Magistrate Judge, who recommended that it be denied on the basis of *Manis v. Corrections Corp. of America*, 859 F. Supp. 302 (M.D. Tenn. 1994), which rejected a qualified immunity defense for other CCA employees. Pet. App. 26-27. The district court agreed and overruled petitioners' objections. *Id.* at 23.

Petitioners filed an interlocutory appeal, *see Mitchell v. Forsyth*, 472 U.S. 511 (1985), to the Sixth Circuit. That court affirmed, holding that private guards employed by a for-profit corporation that operates a correctional facility under contract with a state are not entitled to qualified immunity. *McKnight v. Rees*, 88 F.3d 417 (6th Cir. 1996). Relying on the statement in *Wyatt v. Cole*, 504 U.S. 158, 168 (1992), that "the rationales mandating qualified immunity for public officials are not applicable to private parties," the court noted that, while qualified immunity is needed to protect "a government actor acting for the good of the state," it is not warranted for "a private actor acting for the good of the pocketbook," who has a "greater incentive to cut costs by infringing upon the constitutional rights of prisoners." Pet. App. 15 n.4, 16.

The court also rejected petitioners' contention that conferring immunity on privately-employed prison guards would serve "the public policy underpinnings of qualified immunity." *Id.* at 14-16. Although the court agreed that private prison guards "are serving the public interest by maintaining a correctional facility," it concluded that "as employees of a private corporation seeking to maximize profits, correctional officers act, at least in part, out of a desire to maintain the profitability of the corporation for whom they labor, thereby ensuring their own job security." *Id.* at 15 (footnote omitted). The court likewise rejected petitioners' argument that "the denial of qualified immunity here will . . . deter talented candidates from entering public service," a consideration the court noted was "another of the major concerns undergirding the qualified immunity doctrine." *Id.* at 17. In the court's view, "[so] long as a

profit can be realized from the venture, we have no fear that denying qualified immunity to these defendants will result in a dearth of qualified applicants seeking entry into the field." *Id.* at 18.

Finally, the court explicitly left open the possibility that on remand petitioners could assert a good faith defense. *Id.* at 19. As developed in the Sixth Circuit and elsewhere, a good faith defense will generally permit a defendant who can show that he acted reasonably and without malice to obtain summary judgment.

Judge David A. Nelson concurred in a separate opinion. He agreed that both *Wyatt v. Cole* and the Sixth Circuit's decision in *Duncan v. Peck*, 844 F.2d 1261 (1988), compelled the panel's ruling. Pet. App. 20-21. But Judge Nelson noted that, if the panel were free to decide the case on public policy grounds alone, he would afford petitioners qualified immunity. Pet. App. 19-20.[1]

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[1] Petitioners presented one question in their petition for *certiorari*: whether private prison guards are entitled to qualified immunity in a damages action brought pursuant to § 1983. They now present an additional question for review, namely, whether private prison guards are "state actors subject to liability under 42 U.S.C. § 1983 for conduct committed under color of law." Pet. Br. i; *see also id.* 14-20. Petitioners did not dispute below that "they were acting under the color of state law for the purposes of section 1983 liability," and hence the Sixth Circuit "assume[d] without deciding this fact for the purpose of appeal." Pet. App. 3 n.3. Because there is no disagreement between the parties regarding petitioners' amenability to suit under § 1983, and because this issue was not raised or decided below, it is not properly before the Court.

SUMMARY OF ARGUMENT

Petitioners ask this Court to break new legal ground by extending governmental immunity under § 1983 to private prison guards. They do not seek this dramatic extension of immunity law to further any discernable governmental interest, but rather to facilitate the contracting out of core governmental functions to for-profit corporations. And petitioners are not content with the good faith defense recognized by a number of circuits in the aftermath of *Wyatt*. Instead, they seek a broad immunity from suit, one that requires civil rights complaints to be dismissed prior to discovery unless the defendant violated a clearly established constitutional norm.

Petitioners cannot meet the exacting standards that this Court has invariably applied in governmental immunity cases. Section 1983 was enacted both to deter civil rights violations and to provide a means of redress to individuals deprived of federally guaranteed rights by those acting under color of state law. It is written in broad, categorical terms and contains no exceptions or immunities. For that reason, this Court has conferred immunity on government officials, either absolute or qualified, only where a tradition of immunity was firmly rooted in common law and the immunity was supported by strong policy reasons. *Owen v. City of Independence*, 445 U.S. 622, 629 (1980). Petitioners satisfy neither of these requirements.

I.

Petitioners do not argue that there is any common law basis for conferring qualified immunity on privately employed prison guards. Nor could they, since there is no historical antecedent for any immunity for private persons from tort liability arising out of the unlawful exercise of governmental power. That should end this Court's inquiry because, as this Court has repeatedly said, it does not have a "license to establish immunities from § 1983 actions" in the interests of what it "judge[s] to be sound public policy."

Tower v. Glover, 467 U.S. 914, 922-23 (1984). Yet that is precisely what petitioners are asking this Court to do: impose its own policy judgments about the wisdom of conferring governmental immunity to facilitate the contracting-out of governmental functions. The question whether immunities not existing at common law should be engrafted onto § 1983 is fraught with difficult and fact-intensive policy choices that Congress, not this Court, ought to make. Accordingly, because there is no common law basis for extending qualified immunity to any private parties, this Court should adopt the bright-line rule suggested in *Wyatt* that qualified immunity is unavailable to non-governmental actors.

II.

Petitioners base their claim for immunity solely on the contention that, because private prison guards undertake many of the functions performed by state employees, they should, as a policy matter, be extended the same protection from suits alleging civil rights violations. Even assuming a functional equivalence in the work performed, it does not follow that private guards are entitled to the shield of *governmental* immunity.

A. The main justification for qualified immunity for government officials is to "preserve their ability to serve the public good." *Wyatt*, 504 U.S. at 167. As with all for-profit companies, however, CCA is principally concerned with enhancing its financial performance. CCA owes a fiduciary duty to its corporate shareholders to maximize profits, and this duty surely plays a critical role in CCA's decision-making. The same duty extends to CCA's employees, who profit whenever CCA profits. Thus, there is a substantial risk that CCA employees will sacrifice the rights of inmates on the altar of CCA's financial self-interest. Government officials, in contrast, exercise their discretion *solely* for the public's benefit. Because CCA's employees do not owe an undivided loyalty to the public, they should not be accorded governmental immunity.

B. Petitioners cannot plausibly argue that qualified immunity is needed to "ensure that talented candidates [are] not deterred by the threat of damages suits from entering public service," another justification for governmental immunity stated in *Wyatt*. Aside from the fact that CCA employees are not "entering public service," CCA has an arsenal of inducements available to attract qualified candidates that are generally beyond the reach of government: wage premiums, profit sharing arrangements, employee stock option plans, and, most pertinent to this case, insurance indemnification. As petitioners concede, CCA has indemnified them for litigation costs and may also insure employees against adverse judgments. Nor is qualified immunity essential to CCA's operations, since CCA certainly considered civil rights litigation as a cost of doing business when it bid for the contract to operate SCCC, and, in any event, CCA is fully insured against liability.

C. Petitioners' claim, that for immunity purposes there are no meaningful distinctions between public and private prison guards, is untenable. First, governmental immunity is based, in part, on the recognition that the political system places constraints on governmental actors to deter violations of constitutional norms, and holds those who do commit violations accountable through non-judicial means. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). CCA and its employees are largely insulated from those constraints. Second, because CCA is a private company, CCA's employees lack the protections that enable government employees to criticize official governmental action without fear of reprisal. CCA employees who want to express concern over CCA's treatment of inmates, for example, would do so at their peril, because Tennessee, like most states, provides private employees scant protection from retaliatory discharge.

D. No policy argument favors extending governmental immunity to privately-employed prison guards. *Wyatt* raised the concern that if private parties lack immunity, they may be unfairly held liable where they reasonably rely on a

statute or legal process later held to be unconstitutional. That concern is not present here, since McKnight has alleged a knowing and deliberate violation of established Eighth Amendment standards. Moreover, many circuits, including the Sixth, recognize a defense of good faith that would protect individuals facing the dilemma identified in the *Wyatt* dissent.

Finally, the absence of qualified immunity will not subject CCA and its employees to endless rounds of vexatious prisoner litigation. Prisoner suits must survive a gauntlet of procedural and substantive requirements that deter and weed out non-meritorious cases. Congress has recently imposed additional burdens on prisoner-plaintiffs in the Prison Litigation Reform Act of 1996, which is designed specifically to reduce the volume of frivolous prisoner litigation under § 1983. If further controls on prisoner litigation are warranted, that policy judgment should be made by Congress, not this Court.

ARGUMENT

NEITHER THE COMMON LAW NOR PUBLIC POLICY JUSTIFIES AN EXTENSION OF THE DOCTRINE OF QUALIFIED IMMUNITY TO PRIVATE PARTIES.

Petitioners ask the Court to do something without precedent: extend a governmental immunity to employees of a private, for-profit corporation because their employer has chosen to make its money by performing contract work for a state government. What petitioners seek is broad immunity from suit, not merely a defense to liability if they can show good faith. Qualified immunity entitles a § 1983 defendant to the immediate dismissal of a plaintiff's case, before discovery or an evaluation of the merits, unless the defendant's conduct violated a clearly established constitutional norm. *Harlow v. Fitzgerald*, 457 U.S. 800,

818 (1982). The test is an objective one. The defendant's state of mind is not only irrelevant, but ordinarily it may not be probed by the plaintiff, since one role of qualified immunity is to spare the governmental defendant the burden of discovery. *Id.*; *Behrens v. Pelletier*, 116 S. Ct. 834 (1996). Thus, even where the defendant acted "with the malicious intention to cause a deprivation of constitutional rights or other injury," the plaintiff's case must be dismissed so long as the right allegedly violated was not clearly established. *Harlow*, 457 U.S. at 815; *see also Crawford-El v. Britton*, 93 F.3d 813, 816 (D.C. Cir. 1996) (*en banc*), *cert. pending*, No. 96-827; *see also id.* at 831 n.5 (Silberman, J., concurring).

Not only does the immunity sought by petitioners exceed the good faith defense available to private § 1983 defendants in most circuits, but it is also far broader than the litigation protection available to *government* law enforcement officers at common law. *See Pierson v. Ray*, 386 U.S. 547, 557 (1967) (the "defense of good faith and probable cause" was available to police officers at common law). The Court should be particularly reluctant to extend immunity to § 1983 defendants where non-governmental actors seek to be treated like the sovereign solely for immunity purposes, and do not otherwise assume the political accountability and other burdens associated with governing.[2]

As this Court has often noted, § 1 of the Civil Rights Act of 1871, now codified at 42 U.S.C. § 1983, "creates a species of tort liability that on its face admits of no immunities." *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976). The statute imposes liability on "every person" who, under color of state law, "subjects, or causes to be subjected,

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[2] Petitioners refer to themselves as "quasi-public" servants throughout their brief, but that label has no legal significance. *FTC v. Ruberoid Co.*, 343 U.S. 470, 487-88 (1952) (Jackson, J., dissenting).

any citizen of the United States . . . to the deprivation of any rights, privileges or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. The legislative history "confirm[s] the expansive sweep of the statutory language." *Owen v. City of Independence*, 445 U.S. 622, 635-36 (1980).

Section 1983 plays a dual role in protecting citizens' constitutional and statutory rights — it "deter[s] actors from using the badge of their authority to deprive individuals of their federally guaranteed rights," and it "provide[s] relief to victims if such deterrence fails." *Wyatt v. Cole*, 504 U.S. at 161 (citation omitted). Because of the critical role § 1983 plays in safeguarding individual liberties, courts must be extremely careful when "devising limitations to [this] remedial statute, enacted by Congress, which on its face does not provide for *any* immunities." *Id.* at 171 (Kennedy, J., joined by Scalia, J., concurring) (citation omitted; emphasis in original). Recognizing "the significance of the societal interest in compensating the innocent victims of governmental misconduct," *Owen*, 445 U.S. at 653, the Court has been willing to afford absolute or qualified immunity to § 1983 defendants only in extremely limited circumstances. This reluctance is warranted because, notwithstanding petitioners' attempt to impugn all civil rights litigation as "vexatious," Pet. Br. 11, 24, 27, immunity bars litigation of all but the strongest, most meritorious claims.

For these reasons, *Wyatt* reaffirmed that, in deciding whether a party is entitled to immunity, the Court requires both (1) a common law basis for affording immunity when the Civil Rights Act was enacted in 1871; *and* (2) strong public policy reasons supporting preservation of that immunity. 504 U.S. at 164; *see also City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 259 (1981); *Owen v. City of Independence*, 445 U.S. at 637; *Hafer v. Melo*, 502 U.S. 21, 29 (1991). Petitioners satisfy neither requirement.

I. THE EXTENSION OF QUALIFIED IMMUNITY TO PRIVATE EMPLOYEES IS NOT SUPPORTED BY THE COMMON LAW.

Abandoning any pretense that the immunity they seek has an antecedent at common law, petitioners argue that "this Court needs no considered common law inquiry for granting qualified immunity to these . . . correctional officers." Pet. Br. 33. In all of its § 1983 immunity jurisprudence, however, this Court has insisted that a firm historical basis is a prerequisite to considering the recognition of qualified or absolute immunity because the statute provides for none. *See, e.g., Wyatt v. Cole*, 504 U.S. at 164 (stating that when confronted with a claim to immunity, the Court looks first to whether the "tradition of immunity . . . [is] firmly rooted in the common law" (quoting *Owen v. City of Independence*, 445 U.S. at 637); *accord Malley v. Briggs*, 475 U.S. 335, 339-40 (1986); *Tower v. Glover*, 467 U.S. at 920.

The Court has preserved absolute immunity for some high-level government actors such as judges, because "few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction." *Pierson v. Ray*, 386 U.S. at 553-54. Firm historical precedent has similarly led the Court to preserve absolute immunity for prosecutors and state legislators, *Imbler v. Pachtman*, 424 U.S. at 422; *Tenney v. Brandhove*, 341 U.S 367, 376 (1951), and to spare municipalities liability for punitive damages under § 1983. *City of Newport v. Facts Concerts, Inc.*, 453 U.S. at 260.

The Court has also maintained qualified immunity for state prison officials and other lower-level personnel because of "the common law immunity afforded government officials." *Procunier v. Navarette*, 434 U.S. 555, 561 (1978). Thus, qualified immunity has been made available to, *inter alia*, police officers charged with unconstitutional arrests, *Pierson v. Ray*, 386 U.S. at 557, because the defense

of good faith and probable cause "[was] available to a police officer in the common-law action for false arrest and imprisonment"; to state executive officials charged with unconstitutional use of force, *Scheuer v. Rhodes*, 416 U.S. 232, 241 (1974), because in England a degree of immunity for the executive branch was "long a creature of the common law — [and the Founders] remained committed to the common law"; and to members of a prison disciplinary committee, whose adjudicatory role entitled them to some of the "common law . . . immunity of judges." *Cleavinger v. Saxner*, 474 U.S. 193, 199 (1985).

There is, however, no historical basis in English or American common law for any immunity for private persons from torts arising out of the unlawful exercise of government power. *See Wyatt*, 504 U.S. at 165 ("Even if there were sufficient common law support to conclude that respondents . . . should be entitled to a good faith defense, that would still not entitle them to . . . the qualified *immunity* from suit accorded government officials"); *see also Duncan v. Peck*, 844 F.2d 1261, 1264 (6th Cir. 1988) (there is "no evidence that the common law ever extended immunity to include private citizens"). And, although the burden falls squarely on petitioners to anchor their immunity claim to a firm historical mooring, *Malley*, 475 U.S. at 339-40, their brief effectively concedes that there is none.

Immunities from suit are unavailable to private persons because, at root, governmental immunities derive from the ancient maxim that "the King can do no wrong." Harper, *et al.*, 5 *The Law of Torts* 599, § 29.2 (2d ed. 1986). Permitting the King to be sued in his own court was considered antithetical to his sovereignty, and, over time, the concept of immunity was broadened to encompass other government officials. *Id.* This Court's unwillingness to construe governmental immunities expansively stems from the recognition that, in a democracy, the notion of even a sovereign's infallibility is an anachronism. As Professor Harper observed:

> Just how an immunity that had its roots in feudalism and in a political philosophy associated with the divine right of kings was transplanted to the new republic in America remains something of a mystery. . . . The heavy indebtedness of the states and their precarious financial condition during the years immediately after the Revolution no doubt played a part in this.

Id. 599 & n.8. Whatever the wisdom of importing sovereign immunity concepts into our law for governmental actors, there is no evidence that sovereign immunity played any role in civil litigation against private parties at common law.

The requirement of a common law precedent for a current claim to immunity remains intact even after *Harlow*. To be sure, *Harlow* "completely reformulated qualified immunity along principles not at all embodied in the common law," *Anderson v. Creighton*, 483 U.S. 635, 645 (1987), by replacing the subjective inquiry into malice with the test of objective reasonableness. But *Harlow* did not address, much less abandon, the common law focus on whether a particular type of government actor should receive immunity. Four years after *Harlow*, all members of the Court appeared to endorse the statement in *Malley* that "[o]ur *initial inquiry* is whether an official claiming immunity under § 1983 can point to a common-law counterpart to the privilege he asserts." 475 U.S. at 339-40 (emphasis added).[3]

The requirement of a historical foundation for any immunity is critical, because the *only* justification for grafting immunities onto a statute that facially admits none

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[3] Although *Malley* was not unanimous, the two Justices who concurred in part and dissented in part stated that they "agree[d] with much of the Court's opinion," 475 U.S. at 346 (Powell, J., joined by Rehnquist, J.), and took issue only with aspects of the decision that are not relevant here.

was the Court's conclusion that the Congress of 1871 did not intend to abrogate then-existing immunities "by covert inclusion in the general language" of § 1983. *Tenney v. Brandhove*, 341 U.S. at 376. There is no justification for creating *new* immunities subsequent to the passage of a deliberately sweeping remedial statute.

Because there is no historical basis for conferring immunity on private actors, the Court's inquiry should be at an end. As the Court has repeatedly recognized, "our role is to interpret the intent of Congress in enacting § 1983, *not to make a freewheeling policy choice*, and . . . we are guided in interpreting Congress' intent by the common-law tradition." *Malley*, 475 U.S. at 342 (emphasis added); *see also Wyatt*, 504 U.S. at 171-72 ("It must be remembered that unlike common-law judges whose doctrines we adopt, we are devising limitations to a remedial statute, enacted by Congress, which 'on its face does not provide for any immunities.' . . . [w]e may not transform what existed at common law based on our notions of policy or efficiency.") (Kennedy, J., joined by Scalia, J., concurring) (internal citation omitted); *Tower*, 467 U.S. at 922-23.

Despite the Court's insistence on a common law basis for immunity claims, petitioners make no effort to justify their argument for immunity within the *Wyatt* framework. Petitioners instead contend that the Court should employ the "functional test" that it has used to determine whether *government* officials claiming immunity perform functions similar to governmental actors who had immunity at common law. Pet. Br. 32-46. Under petitioners' theory, private employees should be entitled to immunity whenever they perform functions similar to those carried out by government employees who would have immunity. *Id.* But this Court has never suggested that its "functional test" has any bearing on whether immunity should be extended to *non*-governmental employees. Nor does petitioners' approach even acknowledge the considerable differences between government and private employees that justify differential

treatment in terms of immunity — an issue addressed below.

Even more fundamentally, petitioners' approach is incompatible with *Wyatt*. *Wyatt* recognized that private parties who deprive innocent persons of their legal rights while pursuing personal gain should not have qualified immunity, which would deprive the victims of the opportunity to recover the damages they sustained. Although *Wyatt*'s holding was narrow, the principle on which it rested was not. In deciding that qualified immunity is unavailable to "private defendants faced with § 1983 liability for invoking a state replevin, garnishment, or attachment statute," 504 U.S. at 168-69, the Court stated categorically that "the nexus between private parties and the historic purposes of qualified immunity is simply too attenuated to justify such an extension of our doctrine of immunity." *Id.* at 168.

Wyatt's rationale applies with equal force here. Petitioners — like all private employees of profit-making corporations — are pursuing private gain just as much as the erstwhile cattle baron and his lawyer in *Wyatt*. Their motive is financial reward, not public service. Equally important, by refusing to extend qualified immunity beyond the confines of the common law, the Court would put the policy question whether to create additional immunities to facilitate the privatization of state functions precisely where it belongs: in the hands of Congress. *See Tower*, 467 U.S. at 923.

Because there is no common law support for the immunity petitioners assert, and because the Court has uniformly refrained from making "freewheeling policy choice[s]" regarding immunity, *Malley*, 475 U.S. at 342, the Court should hold that private parties may not invoke qualified immunity to deprive § 1983 plaintiffs of their right to obtain legal redress.

II. THE EXTENSION OF QUALIFIED IMMUNITY TO PRIVATE PRISON GUARDS IS NOT SUPPORTED BY PUBLIC POLICY.

Petitioners' claim should also be rejected because it lacks the "strong" policy justifications that the Court has required before conferring immunity. *See Wyatt*, 504 U.S. at 164-66; *City of Newport*, 453 U.S. at 258-59. As this Court has emphasized, "irrespective of the common law support, we will not recognize an immunity available at common law if § 1983's history or purpose counsel against applying it in § 1983 actions." *Wyatt*, 504 U.S. at 164.

The *Wyatt* Court identified two public policy rationales supporting qualified immunity for certain government officials: the need to "preserve their ability to serve the public good," and the need to "ensure that talented candidates [will not be] deterred . . . by the threat of damages suits from entering public service." *Id.* at 167. These rationales are irrelevant to the private sector. As *Wyatt* noted, "private parties hold no office requiring them to exercise discretion; nor are they principally concerned with enhancing the public good." *Id.* at 168.

This observation has resonance here because petitioners seek to equate work performed under government contract with public service. The question posed in this case is whether qualified immunity should be extended to enhance the ability of for-profit corporations to perform work under government contract. Although this case concerns prison guards, it could just as well involve employees of private companies performing a host of functions that historically were thought to be exclusively governmental.

Privatization may or may not improve government efficiency. But it is significant that this plea for a dramatic expansion of immunity comes not from the State of Tennessee, but from the employees of a private company that is fully insured against its losses. Enhancing the profitability

of private contractors by undercutting the effectiveness of the civil rights laws furthers no legitimate policy interest, and certainly no interest "consistent with § 1983's history or purpose." *Wyatt*, 504 U.S. at 164. Accordingly, although the reasons set forth below explain why private prison guards ought not to be given qualified immunity, most apply equally to employees of other private contractors and support the conclusion that qualified immunity under § 1983 should not be extended to any private actors.

A. Prison Corporations And Their Private Employees Do Not Principally Serve The Public Good.

CCA and its private prison guards perform a service typically provided by the public sector, and, as the Sixth Circuit acknowledged, this service undoubtedly "further[s] the public good." Pet. App. 15. Nonetheless, CCA, as a profit-driven corporation, is principally serving its own financial ends. It is hornbook law that "a corporation should have as its objective the conduct of business activities with a view to enhancing corporate profit and shareholder gain." American Law Institute, *Principles of Corporate Governance* § 2.01(a) (1994); *see also Dodge v. Ford Motor Co.*, 170 N.W. 668 (Mich. 1919). Thus, CCA cannot be motivated primarily, much less solely, by a desire to serve the public interest, because it is required to put its shareholders' interests above all others.

While petitioners and their *amici* assert that cost-cutting motives should not be imputed to correctional officers based on the for-profit status of their employer, they overlook the fact that CCA's profit motive extends directly to its individual employees, such as petitioners. First, petitioners' economic well-being is closely tied to CCA's financial performance. In the words of the Sixth Circuit, "as employees of a private corporation seeking to maximize profits, correctional officers act, at least in part, out of a

desire to maintain the profitability of the corporation for whom they labor, thereby ensuring their own job security." Pet. App. 15. Second, all CCA employees are eligible to participate in its Employee Stock Ownership Plan (ESOP) after one year of service. The ESOP is an investment and retirement plan through which employee and CCA contributions are invested primarily in the common stock of CCA.[4] Because individual CCA shareholder-guards profit whenever CCA profits, the Sixth Circuit's focus on CCA's concern with "the good of the pocketbook" (Pet. App. 15-16) as a factor in the behavior of individual officers was entirely appropriate. Indeed, no less than fifty years ago this Court recognized the potentially corrosive effect of financial self-interest on the independence of government decision-making. *See Tumey v. Ohio*, 273 U.S. 510 (1927).

There are many circumstances in which CCA guards may face a conflict between serving a private master and the public. For example, CCA facilities are compensated by the government at "a net rate per day per inmate . . . . or at a fixed monthly rate," and transportation of inmates is compensated "on a per mile or a fixed fee per trip" basis. CCA, *1995 Annual Report to Shareholders* 38. This flat-rate pricing creates an incentive for both CCA and its employees to minimize the time and expense associated with providing services to prisoners — such as transportation, medical care, vocational training, and the like — because any increased costs of customized care cannot be passed along to the State.

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[4] *See* CCA, *1994 Annual Report to Shareholders* 51: "The Corporation maintains a stock incentive plan which allows for the granting of incentive and non-qualified stock options to all employees on a discretionary basis. The Corporation also maintains a stock option plan . . . ." *See also* CCA, *Amended and Restated Corrections Corporation of America Employee Savings and Stock Ownership Plan Summary Plan Description* 6 (undated).

Petitioners' dedication to CCA's profitability is fundamentally incompatible with the justification for governmental immunities — the need to preserve the ability of government officials to exercise independent judgment solely for the public good. Although petitioners suggest that the "discretionary functions" inherent in a prison guard's job are enough reason to extend qualified immunity, *see* Pet. Br. 35, this argument misses the mark. Qualified immunity is conferred on government actors whose jobs entail "discretion" only because the government is *required* to provide certain core services to the public and because the government exists and acts *solely* to further the public good. As John Locke explained more than two centuries ago:

> Where the legislative and executive power are in distinct hands . . . there the good of the society requires that several things should be left to the discretion of him that has the executive power. . . . [T]here is a latitude left to the executive to do many things of choice which the laws do not prescribe. This power *whilst employed for the benefit of the community*, and suitably to *the trusts and ends of the government*, is undoubted prerogative, and never is questioned.

John Locke, "Of Prerogative," in *The Second Treatise on Civil Government* 80-82 (J.W. Gough, ed. 1947) (1690) (emphasis added). *See also Forrester v. White*, 484 U.S. 219, 232 (1988) (emphasizing the need for government agents to exercise independent judgment for the public good); *Scheuer v. Rhodes*, 416 U.S. at 241 (recognizing the unfairness of second-guessing official "decisions and action to enforce laws for the protection of the public" because "it is not a tort for government to govern") (quotation omitted). The exercise of discretionary judgment alone, where there is no guarantee that judgments are made to advance public

rather than private ends, does not justify an extension of immunity. Indeed, it counsels against it.[5]

Finally, although qualified immunity should not be conferred on a for-profit corporation or its employees regardless of the corporation's profit margin, it bears note that private prison management has proven an extraordinarily lucrative investment sector,[6] with CCA the strongest market player.[7] CCA's revenue grew 36% in 1995 alone, to more than $207 million. As of March 1, 1996, the aggregate market value of CCA voting stock held by non-affiliates of the Company was $1.3 billion.[8] Indeed, CCA posted the fourth largest gain on the entire New York Stock Exchange in 1995. CCA, *1995 Annual Report to Shareholders* 5.

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[5] To guard against personal factors interfering with the independence of judgment, most government officials labor under rigorous conflict of interest rules. *E.g.*, 28 U.S.C. § 445.

[6] *See, e.g.*, Tom Whitfield, *Making Crime Pay: Corrections Corporation Cashes in on Privatized Prisons*, ATLANTA JOURNAL-CONSTITUTION, Feb. 8, 1996, at E1; Sandra Block, *Everybody's Doin' the Jailhouse Stock*, USA TODAY, June 4, 1996, at 3B; Anthony Ramirez, *Crime-Related Investing May Prove to be a Winner for Some*, NEW YORK TIMES, June 14, 1994, at D8.

[7] CCA states that it is "the leading private sector provider of detention and corrections services to federal, state and local governments," CCA, *1995 Annual Report to Shareholders* ("Corporate Profile"), and that it won "the majority of contracts awarded the private sector in 1995." *Id.* at 3.

[8] CCA, *Form 10-K: Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 (for the fiscal year ended Dec. 31, 1995)*, at 1.

Thus, as a purely factual matter, any suggestion that the denial of qualified immunity to private prison guards will sound the death knell for privatized corrections companies like CCA is indefensible.[9]

B. Private Corrections Companies Will Not Be Hindered In Attracting Qualified Candidates Or In Carrying Out Their Functions In The Absence Of Qualified Immunity For Their Employees.

This Court's immunity jurisprudence reflects the understandable concern that those contemplating government service might be deterred by the threat of personal civil liability. *See, e.g., Wood v. Strickland*, 420 U.S. 308, 320 (1975) ("[t]he most capable candidates for school board positions might be deterred from seeking office if heavy burdens upon their private resources from monetary liability were a likely prospect during their tenure"); *Harlow v. Fitzgerald*, 457 U.S. at 814 (describing the potential for "deterrence of able citizens from acceptance of public office" in the absence of some litigation immunity).

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[9] Even in the hypothetical case in which a government contractor operated so close to the margin that the difference between qualified immunity and full § 1983 liability for its employees would spell life or death for the company, governmental immunity should be denied. In *Wyatt*, 504 U.S. at 168, this Court noted that governmental immunities may be necessary in some circumstances "to safeguard government, and thereby to protect the public at large," because government must be able to perform its sovereign functions unimpeded. Private corporations, in contrast, have no obligation to serve any non-shareholder constituency, and may decline entry into any sector where perceived financial risks outweigh expected gains.

It is far-fetched, however, to suggest that qualified candidates will be deterred from seeking employment with CCA by the threat of damages suits. As a for-profit company, CCA can offer a broad array of financial inducements to attract talented candidates that ordinarily are beyond the reach of government: wage premiums, profit-sharing, ESOPs, and, perhaps most importantly of all, insurance. Petitioners admit that CCA is bearing their litigation costs in this case, Pet. Br. 1 n.1, and CCA is free to, and probably does, indemnify its employees for judgments arising out of acts within the scope of their employment. Thus, CCA has ample means to attract and retain qualified employees.[10]

Nor will civil rights litigation hamper CCA's operations. Tennessee law both explicitly forbids private prisons and their insurers from invoking sovereign immunity "in any action arising out of the performance of the contract," Tenn. Code Ann. § 41-24-107(b), and requires private prison operators to carry full liability insurance for civil rights claims. Tenn. Code Ann. § 41-24-107(a) ("no contract for correctional services . . . shall be entered into unless . . . (2) the contractor provides an adequate plan of insurance, specifically including insurance for civil rights claims"). In light of these provisions, CCA no doubt assessed its potential liabilities and took them into account in formulating its bid for the contract to run SCCC. After all, CCA not only voluntarily entered the private prison market, it actively lobbied to wrest control over prisons from the

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[10] Federal employees have no guarantee that either litigation costs or adverse judgments will be paid by the government because the applicable regulations give the Justice Department broad discretion in determining when indemnification is appropriate. *See* 28 C.F.R. § 50.15(c) (1996). Nor, apparently, does Tennessee guarantee state employees indemnification.

State of Tennessee in the first instance. *See* W.J. Cody and Andy D. Bennett, *The Privatization of Correctional Institutions: The Tennessee Experience*, 40 VAND. L. REV. 819, 844-45 (1987) (recounting CCA's efforts to secure a ninety-nine year lease to run Tennessee's prisons, and its "intense lobbying" to secure passage of the legislation authorizing the privatization of Tennessee's prisons).

Given this history, it is hardly surprising that CCA itself has disclaimed any fear that civil rights litigation will interfere with its operations. It has informed its shareholders that "[f]rom a liability standpoint the greatest concern has historically been exposure to civil rights claims," but that these claims pose no problem because "CCA has an insurance program that fully indemnifies it." CCA, *1994 Annual Report to Shareholders* 14. CCA expressed a similarly confident litigation outlook in its Form 10-K filing with the Securities Exchange Commission for 1995 (at 17):

> The Company is currently, and from time to time, subject to claims and suits arising in the ordinary course of business, including claims for damages for personal injuries or for wrongful restriction of, or interference with, inmate privileges. In the opinion of management, the outcome of the proceedings to which it is currently a party will not have a material adverse effect upon its operations or financial condition.

Thus, taking CCA at its word, petitioners' hypothetical fears that prisoner litigation will hinder their employer's operations are without substance.[11]

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[11] Because CCA and similarly situated government contractors can and do insure against the risks of civil rights liability, respondent is mystified by the contention of petitioners and their *amici* that an adverse ruling here "could

(continued...)

In the final analysis, CCA's employees have chosen to work for a company that has voluntarily entered into a long-term contract with the government. Because the absence of qualified immunity for private prison guards will not hamper CCA's ability to attract competent candidates or to run SCCC effectively, this factor too weighs against petitioners.[12]

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[11](...continued)
seriously erode the willingness of the several states, its [sic] political sub-divisions and the federal government to engage private contractors" in prison management. *E.g.*, Pet. Br. 41. Indeed, most states that authorize private prisons also require contractors to obtain insurance. *E.g.*, Ariz. Rev. Stat. § 41-1609.01(M)(2) (1996); Colo. Rev. Stat. § 17-1-202(b) (Supp. 1996); Fla. Stat. Ann. § 957.04(b) (Supp. 1997); La. Rev. Stat. Ann. 39 § 1800.4(E)(3) (Supp. 1997); N.C. Gen. Stat. § 148.37(g) (Supp. 1996); N.M. Stat. Ann. § 33-1-17(D)(3) (Supp. 1996); S.D. Cod. Laws Ann. §§ 24-11-42(4) & (5) (Supp. 1996); Tex. Gov't Code Ann. §§ 495.003(c)(10) & (11) (Supp. 1997); W. Va. Code § 25-5-16(a) (1992); Wyo. Stat. § 7-22-110(a) (1995).

[12] Petitioners' volitional participation in this endeavor places them in a far different position than private parties who, in an isolated instance, are conscripted to perform a government function. This factor distinguishes the situation here from the cases cited by petitioners, Br. 28-29, in which a purely private actor performs an isolated public function at the government's behest. *See, e.g., Warner v. Grand County*, 57 F.3d 962, 965-66 (10th Cir. 1995); *Eagon v. Elk City*, 72 F.3d 1480, 1490 (10th Cir. 1996); *Sherman v. Four County Counseling Ctr.*, 987 F.2d 397, 405-06 (7th Cir. 1993).

C. Privately Employed Prison Guards Should Not Receive Governmental Immunity Since They Are Significantly Less Accountable To The Public Than Government Employees.

This Court's recognition of governmental immunities rests, in part, on the premise that our political system places checks on the exercise of governmental power that ensure accountability and safeguard against violations of law. *Nixon v. Fitzgerald*, 457 U.S. 731 (1982). After deciding that the President has absolute immunity for official acts, the Court in *Nixon* noted that its ruling "will not leave the Nation without sufficient protection against misconduct on the part of the Chief Executive." *Id.* at 757. In addition to the ultimate remedy of impeachment, "there are formal and informal checks on Presidential action," including "constant scrutiny by the press," "[v]igilant oversight by Congress," and "a desire to earn reelection." *Id.*

These constraints have little impact on private corporations like CCA. Accordingly, extension of immunity to private prison guards might be affirmatively dangerous because the one remaining deterrent to the abusive exercise of government power — vigorous judicial oversight — would largely be eliminated. Prison inmates are especially vulnerable to the misuse of governmental power because "the jailhouse . . . door is closed, not open, and . . . there is little, if any, protection [of prisoners] by way of community observation." *Cleavinger v. Saxner*, 474 U.S. 193, 205 (1985). And, as Justice Blackmun remarked in his concurrence in *Hudson v. McMillian*, 503 U.S. 1, 13 (1992), judicial scrutiny is "more valuable" to prisoners than to other members of the public because, by and large, prisoners have been stripped of their franchise. For these reasons, political accountability is a vital prerequisite to a grant of immunity in the prison context. As we now explain, that accountability is lacking here.

1. The political process itself exerts the most obvious discipline on governmental actors' conduct. In a public prison setting, a warden who tolerates abuse of inmates may well lose his or her job because the governor or appointing official fears being held accountable for the warden's acts through adverse press attention, legislative oversight, or even voter response during the next election cycle. While *Nixon v. Fitzgerald* teaches that these constraints are weighty in the public sector, they have almost no force in the private sector, where CCA's primary concern is maintaining its ability to underbid competitors for prison management contracts.

Government officials are also duty-bound to observe the law by their oath of office. This public declaration serves an important normative function:

> Unlike normal tort law, federal and state officials are sworn to uphold the Constitution; violating one's oath may mean a reputation for deceit and unreliability. Certainly a rational actor would avoid this result, if only to avoid a decrease in his or her value as an employee. . . . [S]uch an oath, like a monetary disincentive, can affect the behavior of government officials.

Crawford-El v. Britton, 93 F.3d at 836 (Silberman, J., concurring). Publicly employed prison guards are bound not only by the oath required of all state employees by the Tennessee Constitution, Article X, § 1, but they must also take a special oath of office, pledging that they will "on no occasion, ill treat or abuse any convict under [their] care, beyond the punishment ordered by law, or the rules and regulations of [their] institution." Tenn. Code Ann. § 41-1-103. Violation of the oath "shall be perjury, punishable as in other cases of perjury." *Id.* No oath of office is required of private prison guards under Tennessee law. Indeed, Tenn. Code Ann. § 41-24-111(3) *exempts* private prison contractors from "the provisions governing the appointment,

qualifications, and duties of wardens, superintendents, and other correctional employees."

Public officials are also routinely held accountable by the press and public through access to government records. *Department of Justice v. Reporters Committee*, 489 U.S. 749 (1989). Under Tennessee's open records law, Tenn. Code Ann. § 10-7-503(a), corrections department records are generally available to the public. *See State v. Wigard*, 891 S.W.2d 628 (Tenn. Crim. App. 1994). In contrast, the public has no right of access to records relating to CCA's management of SCCC. While CCA is statutorily required to provide certain information to Tennessee's "select oversight committee on corrections" on a bi-annual basis, Tenn. Code Ann. § 41-24-105, this infrequent government monitoring provides little opportunity for informed debate about private prison operations, and is no substitute for the ability to track measures of prison performance — violence by and against inmates, prison overcrowding, and the like — on an ongoing basis.[13]

2. Government employees frequently play an important role in holding their agencies accountable for misdeeds. As this Court has remarked, "[g]overnment employees are often in the best position to know what ails the agencies for which they work; public debate may gain much from their informed opinions." *Waters v. Churchill*, 114 S. Ct. 1878, 1887 (1994) (plurality opinion). Tennessee, like most states, has developed elaborate civil service rules to ensure that employees are not subjected to adverse personnel actions in retaliation for speaking out on matters of public concern. Tenn. Code Ann. §§ 8-30-326, 328, 331. Fortifying these protections is Tennessee's Public Employee Political

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[13] *See, e.g.*, Nicole B. Casarez, *Furthering the Accountability Principle in Privatized Corrections: The Need for Access to Private Prison Records*, 28 U.MICH. J.L.REF. 249 (1995).

Freedom Act, Tenn. Code Ann. § 8-50-601-04 *et seq.*, a separate part of the Civil Service Act that guarantees government employees the right to communicate with elected public officials "for any job related purpose whatsoever." Tenn. Code Ann. § 50-1-602(a). Public prison guards also have both First Amendment and Due Process rights that insulate them from retribution when they speak out on matters of genuine public concern. *See, e.g., Connick v. Myers*, 461 U.S. 138, 146-47 (1983); *Pickering v. Board of Ed. of Township High School Dist.*, 391 U.S. 563, 568 (1968); *Board of Regents v. Roth*, 408 U.S. 564 (1972).

In marked contrast, Tennessee's Prison Privatization Act explicitly *exempts* private prison guards from the protections their public counterparts enjoy, providing that "Title 8, Chapter 30, relative to civil service, *shall not* apply to employees of a prison contractor." Tenn. Code Ann. § 41-24-111(2) (emphasis added). In addition, employees in Tennessee hold their jobs at their employer's pleasure unless they have a contract for a fixed term of years, and generally have no cause of action for wrongful dismissal. *See Reynolds v. Ozark Motor Lines, Inc.*, 887 S.W.2d 822, 823 (Tenn. 1994). Because they are virtually unprotected from retaliation for speaking out, CCA employees who chose to criticize CCA publicly would do so at their peril.[14]

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[14] Tennessee's general whistleblower statute does forbid an employer from discharging a worker "solely for refusing to participate in, or for refusing to remain silent about, illegal activities." Tenn. Code Ann. § 50-1-304(b). But this provision has been construed narrowly by the courts, which emphasize that, for a plaintiff to state a claim, he must show that his reporting activity was clearly protected by statute or regulation, and that his reporting was the *sole* basis for his discharge. *E.g., Griggs v. Coca Cola Co.*, 909 F. Supp. 1066 (E.D. Tenn. 1995); *Pannell v. Future Now, Inc.*, 895 F. Supp. 196 (W.D. Tenn. 1995).

3. Petitioners and their *amici* do not acknowledge the substantial disparity in accountability between public and private sector actors. Instead, they argue that the marketplace is a sufficient disciplining agent, and suggest that private prison guards perform so competently that there is no cause for concern if they have qualified immunity (which only begs the question why they need immunity). *See, e.g.*, Pet. Br. 43-45. Neither of these contentions can withstand scrutiny.

First, petitioners contend that the desire to "secure and maintain their [employer's] contractual relationship with the State of Tennessee" will induce CCA employees to adhere to "established constitutional norms and legal standards." Pet. Br. 44. This utopian suggestion is belied by, among many possible examples, the widespread and well documented fraud in the defense contracting industry, which, like the private corrections industry, serves an exclusively governmental client and a purely sovereign function — providing for the national defense. If a desire to preserve a lucrative business relationship were sufficient to induce government contractors to comply with the law, market conduct would be entirely self-regulating and abuse non-existent.

Second, petitioners argue that, as an empirical matter, private prisons, in their initial years of operation, have outperformed state prisons, making it safe to assume that there are no significant long-term risks in according private prison employees qualified immunity from suit. Pet. Br. 44-45. Petitioners' empirical premise is questionable, and their selective presentation of data presents a distorted picture of the actual performance record of private corrections corporations to date. In fact, the short-term performance of private prison corporations has been decidedly mixed.[15]

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[15] *See, e.g.*, Pierre Tristam, *Jail Companies Face*

(continued...)

More important, however, is that the long-term viability of prison privatization and the magnitude of the associated risks remain to be seen. Petitioners themselves acknowledge that Tennessee's prison privatization contracts are "unambiguously . . . experimental." Pet. Br. 4. As one commentator cautions:

> We should not . . . be fooled by the "halo effect" — that is, that the first few major experiments will be temporarily attractive because the prison

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[15](...continued)
Problems, THE LEDGER, Apr. 22, 1996, at A1 (stating that as of that date, CCA had 268 pending lawsuits against it, and that between 1991 and 1995, CCA settled 80 cases, paying $2 million for lawsuits involving, *inter alia,* wrongful death, negligent classification resulting in one inmate stabbing another, and violations of constitutional rights); Gary Fields, *Private Prisons Pose Problems,* USA TODAY, Nov. 11, 1996, at 3A (chronicling the problems posed by CCA and other private prison facilities in Texas, where, for example, "[o]ut-of-state inmates who would be housed in maximum-security facilities under Texas guidelines are showing up in minimum- and medium-security private facilities," leading to several escapes); Steven Donziger, *The Prison-Industrial Complex,* WASH. POST, Mar. 17, 1996, at C3 (describing cost-cutting measures at an INS detention facility run by a for-profit corporation, Esmoor Correctional Services, that led to a devastating five-hour riot in June 1995 (CCA has since purchased this facility)); Richard Ford, *Firm Awarded Jail Contract is Accused of Failing Inmates,* THE TIMES (London), Apr. 22, 1993 (describing how in 1988, CCA guards left inmate Rosalyn Bradford, who was suffering from an ectopic pregnancy, screaming in her Tennessee cell for 18 hours before taking her to the hospital).

> administrators, being observed very closely, will be under great pressure to perform. Prison operation is not a short-term business.

Ira P. Robbins, *Privatization of Corrections: Defining the Issues,* 40 VAND. L. REV. 813, 827 (1987). This Court should not dramatically expand the law of immunity based on what petitioners admit is an "experiment."

It is not elevating "form over substance," Pet. Br. 38, to suggest that there are critical differences between public and private prisons and their employees that counsel against extending qualified immunity to private prison guards. For public employees, the democratic political process, and the host of federal and state laws that apply exclusively to government employees and government records, provide structural protections against abusive actions that mitigate the dangers of conferring immunity. Because those structural protections against abuse are largely absent for employees of private, for-profit corrections companies, they should not have the advantage of governmental immunity.[16]

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[16] The ABA's Criminal Justice Section, after detailed study of the legal issues surrounding prison privatization, concluded that "[a] private contractor operating a prison . . . should be prohibited from using immunity defenses, such as sovereign immunity or qualified immunity," to reduce or eliminate liability, because "[p]ermitting a contractor to escape liability would severely undermine the goal of accountability." ABA, *Guidelines Concerning Privatization of Prisons and Jails* ¶7 (Mar. 1989).

D. No Policy Interest Would Be Served By Extending Qualified Immunity To Privately Employed Prison Guards.

As discussed above, there are a number of policy arguments that counsel against conferring qualified immunity on private prison guards. But this case presents more compelling reasons to deny private parties immunity than did *Wyatt*, because here there are no "strong" countervailing policy claims that even arguably support an extension of a governmental immunity to private parties. *Wyatt*, 504 U.S. at 164. In response to *Wyatt*, petitioners and their *amici* point to two additional policy considerations to support their claim to qualified immunity. They first contend that prison guards who rely on presumptively valid laws and rules should not be subjected to § 1983 liability. Second, they argue that qualified immunity is the only way to protect private prison guards from being engulfed in vexatious litigation. These contentions are addressed in turn.

1. *Wyatt* involved a private party who obtained a writ of replevin from a state court judge under a statute subsequently held unconstitutional. This Court ruled that private parties could not invoke qualified immunity even where they claimed reliance on a presumptively valid state law. Although the majority of the Court was unpersuaded that Wyatt's predicament warranted an extension of governmental immunity to a private party, three Justices disagreed:

> The normal presumption that attaches to any law is that society will be benefitted if private parties rely on that law to provide them a remedy . . . . I would have thought it beyond peradventure that there is a strong public interest in encouraging private citizens to rely on valid state laws of which they have no reason to doubt the validity.

504 U.S. at 179-80 (Rehnquist, C.J., dissenting, joined by Souter & Thomas, JJ.).

Here, there is no issue of an "important public interest in permitting ordinary citizens to rely on presumptively valid state laws." To the contrary, McKnight has alleged a knowing and deliberate violation of settled Eighth Amendment standards. Petitioners have made no effort to justify their conduct by reference to any law dictating that prisoners must be shackled at both the hands and feet, let alone one that requires the shackles to remain in place even when it is evident that they are inflicting serious pain and blocking circulation. Nor have petitioners argued that they were unaware of the constraints on their conduct imposed by the Eighth Amendment. *See Farmer v. Brennan*, 114 S. Ct. 1970, 1979 (1994).

Moreover, any prison guard claiming reliance on a presumptively valid state law later found to be unconstitutional would likely be able to rely on a "good faith" defense. The possibility of a good faith defense was "not foreclose[d]" by this Court's decision in *Wyatt*, 504 U.S. at 169, and many circuits have embraced the defense. *See, e.g., Pensky v. Duncan*, 79 F.3d 306, 311 (2d Cir. 1996); *Vector Research, Inc. v. Howard & Howard Attys. P.C.*, 76 F.3d 692, 699 (6th Cir. 1996); *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1276-77 (3d Cir. 1994); *Wyatt v. Cole*, 994 F.2d 1113, 1120 (5th Cir. 1993). In the present case, the Sixth Circuit suggested that "[i]t may be that the appropriate balance to be struck here is to permit the corrections officers to assert a good faith defense, rather than qualified immunity," while noting that this issue was not before it on interlocutory appeal. Pet. App. 19.[17]

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[17] In an Eighth Amendment case alleging "deliberate indifference," like the one at bar, neither qualified immunity

(continued...)

From a defendant's point of view, a good faith defense should be sufficient, as it fully addresses *amici*'s concern that in cases where "the precise contours of constitutional rights have not been clearly established," well-intentioned private actors, including private prison guards, should not be held liable for taking the "decisive action" circumstances may require. Amicus Br. 2. Further, the good faith defense would provide private prison guards as much protection as *government* law enforcement officers historically received. *See Pierson v. Ray*, 386 U.S. at 557 (noting that police officers had only a "good faith and probable cause" defense to actions for false arrest at common law). On the other hand, from a plaintiff's point of view, a good faith defense is clearly preferable to qualified immunity because it permits discovery to explore the motive and knowledge of a defendant, and thus provides a possibility of recovering damages even where an arguably constitutional act was undertaken with an unconstitutional motive.

Although petitioners and their *amici* suggest that withholding immunity from private prison guards will make them undesirably timid with the exercise of force, *see* Pet. Br. 40; Amicus Br. 22-23, there is little danger of that happening in practice. As this Court's jurisprudence clearly reflects, *see, e.g., Hudson v. McMillian*, prison settings provide few incentives to treat prisoners too leniently, since a prison guard's first concern is typically for his own personal safety, and his second, for maintaining prison discipline. *Compare Imbler v. Pachtman*, 424 U.S. at 438 (White, J., concurring, joined by Brennan & Marshall, JJ.)

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[17](...continued)
nor a good faith defense would shield defendants from some form of discovery relating to state of mind, since the test is a subjective one, turning on whether the defendant "knows of and disregards an excessive risk to inmate health or safety." *Farmer v. Brennan*, 114 S. Ct. at 1979.

(highlighting the need for immunity for prosecutors, who in the absence of immunity have incentives not to bring charges).

2. As a final matter, failure to confer qualified immunity on private prison guards will not, as petitioners and their *amici* suggest, lay them bare to endless rounds of vexatious and burdensome litigation. In addition to the good faith defense available to private § 1983 defendants in many circuits, and the reformulated summary judgment standards that make pre-trial dispositions easier to obtain, *see Wyatt*, 504 U.S. at 171 (Kennedy, J., joined by Scalia, J., concurring), there are federal statutes specifically designed to deter non-meritorious prisoner claims. To begin with, the federal *in forma pauperis* (IFP) statute that governs the claims of most prisoner litigants, 28 U.S.C. § 1915, plays an important role in ensuring that civil rights defendants will not be distracted from their duties — even momentarily — by insubstantial claims. District courts may dismiss any IFP suit *sua sponte* "if satisfied that the action is frivolous or malicious." 28 U.S.C. § 1915(d). The statute accords judges the unusual power to look behind a complaint's factual allegations and dismiss those claims whose factual contentions are clearly fanciful. *Neitzke v. Williams*, 490 U.S. 319, 325 (1989). Here, § 1915 scrutiny resulted in the dismissal of one defendant and the elimination of a claim against petitioners that did not assert an actionable civil rights violation.

The next hurdle that a prisoner-plaintiff must overcome was added by Congress just last year in the Prison Litigation Reform Act, P.L. 104-134, 110 Stat. 1321 (Apr. 26, 1996). This statute was designed to prevent frivolous prisoner filings by, *inter alia*, requiring prisoners seeking IFP status to show that they are virtually asset-less; prohibiting an IFP prisoner from bringing almost all types of civil actions or appeals if the prisoner has already filed multiple frivolous actions or appeals; and allowing any § 1983 defendant to waive the right to reply to any prisoner action without the waiver

constituting an admission of the allegations contained in the complaint. This legislation demonstrates that Congress is aware of, and fully capable of addressing, any systemic problems posed by prisoner litigation. Significantly, however, Congress chose not to bestow a statutory immunity on private prison guards confronted with § 1983 damage suits, even though the Prison Litigation Reform Act dealt in depth with § 1983 actions, the phenomenon of prison privatization was over a decade old when the Act was passed, and this Court's decision in *Wyatt* denying private parties qualified immunity came four years earlier.

Admittedly, Congress has not explicitly rejected the idea of extending qualified immunity to the employees of government contractors, but it surely has not embraced it. Congress has far broader investigatory powers than a court and is, of course, free to confer any immunities it chooses under § 1983, based on whatever balance of interests it deems appropriate. That option warrants judicial restraint here. Petitioners' plea is based solely on policy considerations, and, as this Court said in *Tower v. Glover*, 467 U.S. at 923, "[i]t is for Congress to decide whether § 1983 has become too burdensome . . . and, if so, what remedial act is appropriate."

* * *

In § 1983, Congress assigned the federal courts a central role in ensuring that violations of constitutional rights by state actors were both deterred and redressed. Immunities from civil rights suits significantly thwart Congress' dual purpose, because the impact of an immunity ruling is to throw a case out of court, typically at the pleading stage, simply because the plaintiff cannot establish that the defendant violated a settled constitutional norm. Thus, even intentional acts of misconduct can escape judicial review, and violations of civil rights go uncompensated. Because any immunity ruling effectively short-circuits the judicial process, this Court has recognized immunities for public officials

sparingly. For the reasons set forth above, the Court should be doubly wary of extending governmental immunity to private parties, who have no historical basis for their claim.

CONCLUSION

For the foregoing reasons, the judgment of the Sixth Circuit should be affirmed, and this case remanded to determine whether petitioners violated Ronnie Lee McKnight's Eighth Amendment rights.[18]

Respectfully submitted,

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[18] This case should be remanded even if the Court finds that petitioners are entitled to assert qualified immunity. In that event, McKnight would be entitled to show that petitioners' conduct violated clearly established Eighth Amendment norms.

[*] Counsel wish to acknowledge the research assistance provided by Rémi Abbott Ratliff, a member of the Bar of the State of Texas.